NO. 80-5693

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MICHAEL RODAK, JR., CL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI, ALTERNATIVE MOTION TO DEFER THE COURT'S CONSIDERATION UNTIL FINAL JUDGMENT IN THE TEXAS COURT OF CRIMINAL APPEALS, AND MOTION FOR EXTENTION OF TIME IN WHICH TO FILE ITS BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this memorandum opposing certiorari, alternative motion to defer the Court's consideration until final judgment in the Texas Court of Criminal Appeals and its motion for extension of time in which to file its brief in opposition, and as grounds

therefor, would respectfully show the following:

I.

STATEMENT OF THE CASE

Petitioner's direct appeal from his conviction for capital murder is currently pending in the Texas Court of Criminal Appeals. On July 16, 1980, Petitioner's conviction was affirmed by that court. Petitioner timely filed a motion for leave to file a motion for rehearing, which was denied on September 17, 1980. Thereafter, Petitioner filed a motion for leave to file a second motion for rehearing. Such a motion contravenes the rules of the Texas Court of Criminal Appeals:

> Rule 11. Rehearings After an Initial Disposition by the Court En Banc
>
> * * *
>
> If the Court hands down an opinion in connection with the determination of a motion for rehearing, the losing party, within fifteen days after such opinion is handed down, may seek a further rehearing by availing himself of and following the rules and procedures above set forth with respect to motions for rehearing; but further motions for leave to file and further motions for rehearing shall not be filed or considered in any other event.

Rule 11, rules foll. Tex. Code Crim. Proc. Ann. art. 44.33 (Vernon).

As is evident from examination of the perfunctory denial of Petitioner's motion for leave to file his first motion for rehearing in the Texas Court of Criminal Appeals (Appendix B to the petition for writ of certiorari), no "opinion" was handed down "in connection with the determination of [the] motion for rehearing." And the court's own rules provide that

"further motions for leave to file and further motions for rehearing shall not be filed or considered in any other event."

Nevertheless, the motion for leave to file the second motion for rehearing was granted by the Texas Court of Criminal Appeals on October 22, 1980. The case was again submitted on November 12, 1980, and is currently under consideration by that court *en banc* (*See* Exhibit A).

II.

MEMORANDUM OPPOSING CERTIORARI

The petition for writ of certiorari should be denied because it is premature. In spite of the unusual procedural means by which Petitioner has convinced the Texas Court of Criminal Appeals to reconsider his case, it is clear that that court has elected to do so. (*See* Exhibit A). Considerations of both comity and judicial economy dictate that the Court should dismiss the petition for writ of certiorari as prematurely filed. Comity so dictates because the Court should not rule upon the issues presented until the state appellate court has finally done so. Judicial economy so dictates because the issues presented may become wholly different in the event that the Texas Court of Criminal Appeals issues a new written opinion. In fact, it is entirely possible that this case may be mooted by the Court of Criminal Appeals. That result will follow if that court grants the relief sought by Petitioner therein.

For these reasons, the petition for writ of certiorari should be denied.

III.

RESPONDENT'S ALTERNATIVE MOTION TO DEFER THE COURT'S CONSIDERATION UNTIL FINAL JUDGMENT IN THE TEXAS COURT OF CRIMINAL APPEALS

Because there is no final judgment in the Texas Court of Criminal Appeals, Respondent alternatively requests that this Court defer its consideration of this petition for writ of certiorari until the final disposition of Petitioner's motion for rehearing in the state court. Since that court has not finally disposed of Petitioner's contentions regarding his conviction, Respondent submits that the nature of the judgment now sought to be reviewed may change upon the state court's final judgment. Thus, Petitioner may be granted the relief he seeks in the Texas Court of Criminal Appeals, or if relief is not granted in the state court, the questions presented for review in his petition for writ of certiorari may, of necessity, be different. Similarly, the response by the State of Texas to questions presented for review may be affected by any change in the original opinion rendered in this case by the Texas Court of Criminal Appeals.

IV.

RESPONDENT'S MOTION FOR EXTENSION OF TIME IN WHICH TO FILE ITS BRIEF IN OPPOSITION

Respondent submits that there is no final judgment in the Texas Court of Criminal Appeals, and requests an extension of time in which to file its brief in opposition to certiorari until thirty (30) days after final judgment in the Texas Court of Criminal Appeals. In the event that after final judgment in the Texas Court of Criminal Appeals, Petitioner seeks and is granted leave to amend his petition for writ of certiorari, Respondent requests thirty (30) days after receipt of such amended petition in which to file its brief in opposition. In the event that Respondent's motions are denied by the Court, Respondent requests an extention of time in which to file its brief in opposition until thirty (30) days after such denial.

V.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the petition for writ of certiorari be denied; or, alternatively, that its consideration be deferred pending final judgment in the Texas Court of Criminal Appeals, and that Respondent be granted an extension of time of thirty (30) days after final judgment in the Texas Court of Criminal Appeals, or after receipt of an amended petition for writ of certiorari, or after any denial of these motions, in which to file its brief in opposition.

Respectfully submitted,

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AFFIDAVIT

BEFORE ME, the undersigned Notary Public in and for Travis County, Texas, on this day personally appeared Thomas Lowe, Clerk, Texas Court of Criminal Appeals, known to me to be the person whose name is subscribed hereto, who being first duly sworn in the manner provided by law, on oath stated as follows:

I, Thomas Lowe, Clerk of the Texas Court of Criminal Appeals at Austin, Texas, do hereby certify that the records of this Court are prepared and maintained under my direction pursuant to my official duties as Clerk for the Texas Court of Criminal Appeals, and that they are true and correct. I do hereby certify that on October 22, 1980, the Court granted leave to file Appellant's second motion for rehearing in the case

styled *Murriel Don Crawford v. The State of Texas*, Cause No. 57602, on appeal from Potter County, Texas. That case was then submitted to the Court *en banc* on November 12, 1980, and it is currently under consideration by the Court.

/s/

THOMAS LOWE, CLERK
Texas Court of Criminal Appeals

SWORN TO AND SUBSCRIBED before me, the undersigned authority by the said Thomas Lowe, Clerk, Texas Court of Criminal Appeals, on this the *1st* day of December, 1980, to certify which witness my hand and seal of office.

/s/

NOTARY PUBLIC in and for
Travis County, Texas
Paul Womack

My commission expires:

April 18, 1981.